Shoppers Food Warehouse Corporation *and* United Food and Commercial Workers Local 400, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC. Cases 5–CA–23249 and 5–CA–23394

September 30, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On April 25, 1994, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order, only to the extent consistent with this Decision and Order.

The pertinent facts are as follows. The Respondent operates a chain of retail food stores. The Union represents the Respondent's employees within a 25-mile radius of Washington, D.C., and has been signatory to a series of collective-bargaining agreements with the Respondent for many years. The agreement in effect during the events at issue contained a successorship clause which stated that the agreement would be binding on all signatories as well as their successors and assigns and that the Respondent promised not to transfer operations without first securing the successor's agreement to assume the Respondent's contractual obligations. The agreement also contained article 2.2, which stated that ''if [the Respondent] should establish a new food store, or stores . . . this agreement shall apply to such new store or stores.''

In July 1992, the Union heard rumors that the Respondent was going to open a discount beer and wine store within the Union's jurisdiction. Earman, a union official,[1] questioned Kaplan, an official of the Respondent, who confirmed the existence of the new store but stated that it had nothing to do with the Union. When pressed, Kaplan said that the Respondent's personnel would be handling the new store's hiring, training, and payroll, but he disputed Earman's contention that its employees would be part of the bargaining unit.

When the Union subsequently renewed its contention in writing to the Respondent that employees of the new store would be part of the unit, the Respondent restated its position that the new store would be a separate operation and not a food store, a reference to the collective-bargaining agreement's article 2.2. The Union demanded to arbitrate the applicability of the contract to the new store, and the Respondent refused.

The new store, which was named Total Beverage by the time it opened, began operating in October 1992. Subsequently, the Union received documents indicating that some items sold to Total Beverage were billed to it ''c/o Shoppers Food Warehouse'' and that some goods were transferred from a Shoppers Food Warehouse store to the Total Beverage store, which, according to undisputed record evidence, was designated Respondent's store #99. Meanwhile, the Union was engaged in litigation in Federal district court to compel arbitration of the dispute, during which the Respondent's attorney admitted that the Respondent, through a subsidiary, ''owned, managed, and operated'' Total Beverage prior to February 28, 1993. On that date, the Respondent, which itself is affiliated with the Dart Group, sold Total Beverage to a wholly owned subsidiary of the Dart Group.

During the same time period, the parties began contract negotiations for a successor agreement. On March 11, 1993, the Respondent submitted its proposal for a new agreement in which it, inter alia, proposed to eliminate the successorship provision contained in the expiring agreement. According to Earman, this led the Union to be concerned that the Respondent was going to attempt to move some of its operations to nonunion entities. The Respondent withdrew this proposal at a later bargaining session.

On March 12, 1993, the day following the Respondent's bargaining proposal, the Union requested the Respondent to furnish certain information concerning who owned, managed, and operated Total Beverage from its inception to that date because, as stated in the request, the Union believed such information was relevant to a determination of whether the Respondent was in violation of article 2.2 of the parties' agreement. The Respondent refused to provide the information.

The judge noted that the burden was on the Union to demonstrate relevance where, as here, the information it requested concerned matters outside the bargaining unit. He concluded that the Union did not demonstrate that the requested information was relevant, essentially finding that the Union did not have a reasonable basis for requesting the information sought. Thus, he dismissed the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the information. For the reasons set forth below, we find merit to the General Counsel's and the Charging Party's exceptions to the judge's conclusion.

[1] At one point in his decision, the judge inadvertently referred to Earman as an official of the Respondent. We correct this factual error, which does not affect our decision.

As the judge noted, it is well settled that an employer, on request, must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty to provide information includes information relevant to contract administration and negotiations. *Barnard Engineering Co.*, 282 NLRB 617, 619 (1987); and *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). As further noted by the judge, where, as here, the information sought concerns matters outside the bargaining unit, such as those related to single employer or alter ego status, a union bears the burden of establishing the relevance of the requested information. *Reiss Viking*, 312 NLRB 622, 625 (1993); and *Duquesne Light Co.*, 306 NLRB 1042 (1992). A union has satisfied its burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. *Knappton Maritime Corp.*, 292 NLRB 236, 238–239 (1988). See also *Postal Service*, 310 NLRB 391 (1993).

The Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Reiss Viking*, supra; *Children's Hospital of San Francisco*, 312 NLRB 920, 930 (1993); and *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985). In this regard, the Board does not pass on the merits of a union's claim of breach of a collective-bargaining agreement in determining whether information relating to the processing of a grievance is relevant. *Reiss Viking*, supra; and *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990).

Applying these principles, we find, contrary to the judge, that the Union established that the requested information was relevant to the Union's grievance processing and collective-bargaining functions. Earman initially questioned Kaplan based on a rumor Earman had heard that the Respondent was opening a beer and wine store within the Union's jurisdiction. Although Kaplan, in confirming the rumor, denied that employees of the new store would be covered under the parties' collective-bargaining agreement, he conceded that the Respondent would perform the new store's personnel functions. Additionally, in connection with the Union's attempts to compel arbitration, it was admitted that the Respondent owned, managed, and operated Total Beverage until it was sold to a related affiliate.

The Union was not required to show that the information which triggered its request was accurate or ultimately reliable, and a union's information request may be based on hearsay. *Magnet Coal*, 307 NLRB 444 fn. 3 (1992). We further note that the Union was not required to accept the Respondent's response that Total Beverage was a totally separate operation and not a food store within the meaning of the contract. By the same token, the Union was entitled to conduct its own investigation and reach its own conclusions about the applicability of the agreement. See *Reiss Viking*, supra. Thus, as the judge himself concludes, there is no doubt that the Union had reason to believe under the circumstances that the ownership of the Respondent and Total Beverage were closely linked, if not identical.

Furthermore, during approximately the same period of time, at the parties' first negotiating session for a new agreement, the Respondent proposed eliminating existing contract language assuring that the parties' agreement would be binding on the Respondent's successors and assigns in the event of a sale or transfer of the Respondent's operations. It was immediately after this event that the Union requested information concerning the relationship of the Respondent and Total Beverage. Earman testified in this regard that the Respondent's proposal led the Union to be concerned that the Respondent was going to attempt to ''spin off'' portions of its operations to nonunion entities. Contrary to the judge, we cannot conclude that the Union's concern during collective bargaining was speculative considering the Respondent's bargaining stance and its concurrent actions denying any obligation to apply the expiring agreement to the new operation.

Additionally, the Union had received documents from unit employees confirming that the Respondent performed payroll functions for the Total Beverage store and further establishing that the Respondent paid for products shipped to Total Beverage, thus providing further support for its belief that the two operations were interrelated. Finally, the Union received two documents reflecting that products were transferred between one of the Respondent's stores and Total Beverage. Significantly, this documentation indicated a transfer of products from ''store 25'' to ''store 99,'' further indicating that the Respondent itself made no distinction in its designations of Total Beverage and its other stores. The judge discounted this evidence of transfer as essentially insufficient to establish a reasonable basis for the Union's belief that the contract applied to the Total Beverage store, noting that it involved a transfer of only two boxes of fruit on one occasion. Contrary to the judge, we conclude that the documented transfer of products on at least one occasion was sufficient objective evidence, together with the other factors discussed above, to support the Union's request for information about the interrelationship of Total Beverage and the Respondent's stores. That information would aid the Union in its determination of whether the parties' contract had been violated.

In light of all the above, we conclude that the Union had a reasonable and objective factual basis for its information request.

We further find that the requested information concerning the interrelationship of the Respondent and Total Beverage was relevant and necessary to the Union in its role as the collective-bargaining representative. In this regard, we find the information was of potential or probable relevance in aiding the Union in developing its bargaining positions during negotiations, noting particularly the timing of the Union's request, i.e., the day after the Respondent made its initial bargaining proposal to eliminate the ''successor'' provision of the expiring agreement. Further, contrary to the Respondent's argument, the fact that it subsequently withdrew this proposal does not render the Union's concern baseless under all the circumstances set forth above.[2] Additionally, we conclude that the requested information was necessary to the Union's role in administering and enforcing its collective-bargaining agreement. During the events at issue, the Union was attempting to arbitrate the Respondent's refusal to apply the agreement to Total Beverage employees. The requested information was clearly relevant to its evaluation and preparation of its position in anticipation of the possible arbitration hearing, whether or not the Union ultimately prevailed as to all aspects of its arbitration case on the merits. See *Arch of West Virginia*, 304 NLRB 1089, 1092 (1991).

We find that the judge's conclusion in effect was tantamount to a determination on the merits that the Union did not establish a contract violation. But that determination properly rests with the arbitrator, not the Board. Indeed, the Board's discovery-type standard favoring disclosure is intended to facilitate the arbitral process by permitting a union access to a broad scope of potentially useful information. See *Barnard Engineering*, supra, citing *Acme Industrial*, supra; and *Pfizer, Inc*., supra, citing *Communications Workers Local 13 (Detroit Newspaper) v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979).

In sum, in light of all the above, we conclude that the Union's information request concerned relevant and necessary information and that the Respondent violated Section 8(a)(5) by failing to provide the requested information.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shoppers Food Warehouse Corporation, Lanham, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as new paragraph 1(a) and renumber the subsequent paragraphs accordingly:

''(a) Refusing to bargain collectively with United Food and Commercial Workers Local 400, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC, by refusing to furnish it with information that it requests which is relevant and necessary to the Union's performance of its functions as the exclusive bargaining representative of employees of the appropriate unit. The unit is:

> All employees, except Store Managers, in the Respondent's retail food stores within a radius of 25 miles of Washington, D.C. and Prince Georges, Charles, St. Mary's, Calvert, and Montgomery Counties, and in Ann Arundel County south of South River from Chesapeake Bay to State Highway #450, south of State Highway #450 from South River to Prince Georges County in Maryland and the Commonwealth of Virginia.''

2. Insert the following as new paragraph 2(a) and renumber the subsequent paragraphs accordingly:

''(a) Furnish the Union with the information it requested on March 12, 1993.''

3. Substitute the attached notice for that of the administrative law judge.

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[2] Member Cohen does not find that the information was relevant to the negotiations for a new contract. In this regard, he notes that the Union's information request was based solely on the grievance. However, this is not to say that the Respondent's position in negotiations is irrelevant to this case. The fact that the Respondent sought to eliminate the successorship clause, considered together with the other actions of the Respondent described herein, would reasonably lead the Union to believe that unit work was being transferred to related entities. The Union's concern about the Total Beverage operation is to be viewed in this context. Similarly, the grievance concerning Total Beverage and the information sought in connection therewith is likewise to be viewed in the same context.

[3] The Charging Party Union requests that it be awarded attorney's fees and related expenses for costs it incurred in preparing for and attending the hearing. The Union argues in support of its request that the Respondent, in its answer to the complaint, denied the complaint allegation that it failed to provide information but presented no evidence at the hearing to challenge this allegation. It asserts that the Respondent's admission of this fact would have obviated the need for a hearing.

We deny the Union's request. The Board provides for litigation expenses only in extraordinary cases as a means of discouraging frivolous litigation. *Heck's Inc*., 215 NLRB 765, 767–768 (1974). In this case, the complaint allegation denied by the Respondent was that it had failed to provide information earlier described in another paragraph of the complaint, which paragraph was referenced in the allegation itself, as ''necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative.'' Thus, the Respondent's answer is reasonably construed as denying that it had failed to provide necessary and relevant information. Under those circumstances, and apart from any other considerations, we deny the Union's request as lacking in merit.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agenecy of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT meet with you regarding your grievances without affording representatives of the Union an opportunity to be present.

WE WILL NOT refuse to bargain collectively with United Food and Commercial Workers Local 400, a/w United Food and Commercial Workers International Union, AFL–CIO, CLC, by refusing to furnish it with information that it requests which is relevant and necessary to the Union's performance of its functions as the exclusive bargaining representative of employees in the appropriate unit. The unit is:

> All employees, except Store Managers, in the Respondent's retail food stores within a radus of 25 miles of Washington, D.C. and Prince George's, Charles, St. Mary's Calvert, and Montgomery Counties, and in Ann Arundel County south of South River from Chesapeake Bay to State Highway #450, south of State Highway #450 from South River to Prince George's County in Maryland and the Commonwealth of Virginia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the information it requested on March 12, 1993.

SHOPPERS FOOD WAREHOUSE CORPORATION

Nathan W. Albright, Esq., for the General Counsel.
Edward J. Gutman, and *Rochelle S. Eisenberg, Esqs. (Blum, Yumkas, Mailman, Gutman & Denick, P.A)*, of Baltimore, Maryland, for the Respondent.
Carey R. Butsavage, Esq., of Washington, D.C., for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. There are two distinct facets to this case. The first has to do with a grievance filed by Local 400 of the United Food and Commercial Workers Union (the Union or Local 400) on behalf of Frederick Plummer who, at the time, was an employee of the Respondent, Shoppers Food Warehouse Corporation (SFW). The second concerns the refusal of SFW to provide information to Local 400.[1] I turn first to the Plummer grievance.[2]

I. FREDERICK PLUMMER'S GRIEVANCE

A. *The Facts*

The events of interest to us occurred between December 1992 and March 1993. During that period (and for many years prior to that period) a collective-bargaining agreement was in effect between SFW and Local 400. The terms of the agreement included, among other things, a grievance provision[3] and, of course, specified wages for all bargaining unit employee classifications.[4]

At all relevant times SFW employed Plummer as a ''courtesy clerk'' at its store in Clinton, Maryland.[5] As such Plummer was a member of the bargaining unit. SFW paid Plummer as a 5-hour-per-week part-time employee. But Plummer opted to work about 50 hours per week, i.e., 45 hours per week ''off the clock''—in order to garner tips. (Apparently a number of SFW's courtesy clerks did the same thing, thereby earning in the neighborhood of $500 per week, almost entirely from tips.)

Early in December 1992 an SFW official told Plummer that SFW would no longer allow its courtesy clerks to work off the clock. (The Company was concerned about the possible illegality of such off-the-clock work.) That led Plummer to ask a representative of Local 400, Paul Evans, to file a grievance on his behalf. Plummer told Evans that SFW had been paying him for 5 hours per week but that he had been working 50 hours per week. Accordingly, on December 9, 1992, a letter went out from Local 400 to SFW asking that:

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[1] The charge in Case 5–CA–23249 (regarding the Plummer grievance) was filed on January 11, 1993. The complaint in that case issued on February 24, 1993. The charge in Case 5–CA–23394 (the refusal-to-provide-information case) was filed on March 22, 1993, and was amended on May 12, 1993. The complaint in that case issued on August 30, 1993. The two cases were consolidated for hearing on November 24, 1993. I held a hearing in this matter in Washington, D.C., on February 24, 1994. The complaint in Case 5–CA–23249 was amended by oral motion at the hearing.

[2] SFW admits that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the National Labor Relations Act (the Act), that the Board has jurisdiction over this matter, and that Local 400 is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] The grievance provision reads:

> In the event a grievance or dispute arises under the terms and during the life of this Agreement that cannot be adjusted by the Union and the employer within a reasonable time, either party may request that such grievance or dispute be submitted to arbitration . . . . [Sec. 19.1 of the collective-bargaining agreement, G.C. Exh. 2.]

[4] The unit:

> All employees, except Store Managers, in Respondent's retail food stores within a radius of twenty-five (25) miles of Washington, DC and Prince George's, Charles, St. Mary's, Calvert and Montgomery Counties, and in Anne Arundel County South of South River from the Chesapeake Bay to State Highway #450, South of State Highway 450 from South River to Prince George's County in Maryland the Commonwealth of Virginia.

SFW admits that Local 400 is the exclusive bargaining representative of the members of the unit.

[5] Plummer ceased being an SFW employee sometime prior to the hearing herein.

(1) SFW employ Plummer on a full-time basis; and (2) SFW pay Plummer back wages for all the off-the-clock hours that he had worked. Thereafter Evans telephoned two SFW officials about the Plummer grievance, Julie McWilliams and Kathy Yarbourough. (McWilliams is SFW's director of personnel; Yarbourough is SFW's personnel coordinator at the Clinton store. Both are SFW supervisors and agents within the meaning of Sec. 2(11) of the Act.) In the course of Evans' conversation with Yarbourough, Yarbourough told Evans that she was going to investigate the facts of the matter. Evans responded that Yarbourough should speak to Plummer about matters connected with the grievance only when a union representative was present.

A week or so later McWilliams visited SFW's Clinton store for reasons unconnected with the Plummer grievance. On that same day another SFW supervisor, Larry Noell, visited the Clinton store for reasons having nothing to do either with McWilliams or with the Plummer grievance. Noell had previously been the manager of the Clinton store and felt that he had a good relationship with Plummer. McWilliams and Noell came across one another in the store, began discussing the Plummer grievance, and decided to speak about it to Plummer, who was at work at the store.

Without contacting Local 400, McWilliams and Noell called Plummer to the store's conference room and asked Plummer what it would take to have Plummer agree to withdraw the grievance. Plummer responded that he wanted a full-time job. McWilliams told Plummer that, if he would sign a statement to such effect, SFW would put him on full time. Plummer agreed to do so, McWilliams said that she would draft the appropriate language, and the meeting ended. Nothing was said by Plummer or either of the two SFW officials about the grievance's demand for backpay. No representative of the Union was present at any time during the meeting.

On December 24, 1992, Noell met with Plummer at the Clinton store. Again, Local 400 had not been notified of the meeting and no representative of the Union was present. Noell proposed that Plummer sign a statement that read:

> I Fred Plummer knowingly and voluntarily have agreed to accept full time status with Shoppers Food Warehouse effective December 27, 1992, in full settlement of all known grievances and/or claims against Shoppers.
>
> I hereby willingly state that Shoppers Food Warehouse and I fully agree on this settlement. I knowingly waive any arbitration or further proceedings of such claims and/or grievances.

Plummer signed the statement. SFW did honor its commitment to employ Plummer on a full-time basis.[6]

Two days later Plummer called Local 400 and told Union Official Ronald Reaume that he and SFW had resolved the issues that had led to the grievance and that he wanted the Union to drop the grievance. Reaume responded by meeting twice with Yarbourough on December 30 about the Plummer grievance. During the second meeting Reaume told Yarbourough that Local 400 had ''a problem with the Fred Plummer situation because we [the Union] should have been involved.''[7]

According to McWilliams, upon hearing that Local 400 was concerned about the settlement of the Plummer grievance because it had not participated in the settlement, SFW—

> basically considered it . . . null and void. . . . We never held them [Local 400] accountable for it.

The record does not, however, indicate that SFW promptly communicated its ''null and void'' position to Local 400.

On March 8, 1993, representatives of Local 400 and SFW met at the Clinton store to consider the Plummer grievance. The Company did not assert that the grievance had been settled. And neither the General Counsel nor the Union contends that at this juncture there was anything improper in the way the Company negotiated with Local 400 about the grievance. A day later a union representative telephoned McWilliams and engaged in further discussions about the grievance. On various occasions thereafter representatives of Local 400 and SFW have briefly spoken about the grievance. But no resolution of the grievance has been reached. The Union had not asked that the grievance be arbitrated.

B. *The Plummer Grievance—Conclusion*

Section 9(a) of the Act[8] ''gives the Union the right to be present during the adjustment of any grievance (whether or not its presence is wanted by the employer or the grievant).'' *Harowe Servo Controls*, 250 NLRB 958, 1049 (1980). Accord: *Circuit-Wise, Inc*., 306 NLRB 766 (1992); *Van Can Co*., 304 NLRB 1085, 1087 (1991). Here SFW purportedly settled Plummer's grievance without affording Local 400 that right to be present, doing so, indeed, even though it was the Union that had presented the grievance to SFW. SFW thereby violated Section 8(a)(5). E.g., *Circuit-Wise*, supra.

It is true that SFW proceeded to negotiate with Local 400 about the grievance, treating Plummer's statement as ''null and void.'' But for several reasons that does not override the fact of SFW's violation of Section 8(a)(5). First, there is a substantial likelihood that Plummer's (unrepresented) decision to accept a full-time job as full settlement of the grievance weakened the Union's position in the subsequent negotiations concerning settlement of the grievance. Second, the course of action that SFW followed could too easily undercut a union's position in the eyes of the members of the bargaining unit. Third, SFW failed to take prompt steps to repudiate its action—to assure ''employees that in the future their employer will not interfere with the exercise of their Section 7 rights.'' *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Thus there has been no showing that, upon learning of Local 400's objection to SFW's direct dealings with

[6] In fact SFW changed Plummer's employment from part time to full time as of Plummer's first meeting with McWilliams and Noell.

[7] The quotation is from Yarbourough's notes, G.C. Exh. 8.

[8] The second and third provisos of Sec. 9(a) read:

> . . . any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given an opportunity to be present at such adjustment.

Plummer, SFW advised the bargaining unit members—or even just Plummer—of its error.

SFW contends that its violation was so de minimis that its actions do not merit a remedial order. And the record does show that SFW's handling of the Plummer grievance was an aberration. Local 400 files about 25 grievances a month with SFW—around 300 a year. Virtually all are settled. A few go to arbitration. Neither the General Counsel nor the Union contends that in any other grievance has SFW dealt directly with an employee rather than with a representative of the Union. Nonetheless, action by an employer to settle a union-filed grievance by direct dealings with an employee outside the presence of the union goes beyond a de minimis violation of the Act.

Finally, SFW urges that the matter be deferred to arbitration citing, e.g., *Southern California Edison Co.*, 310 NLRB 1229 (1993). But SFW's action of concern to us here ''does not involve a problem of contract interpretation or require the special competence of an arbitrator.'' *R. T. Jones Lumber Co.*, 313 NLRB 726 (1994). Deferral thus would be inappropriate.

II. THE UNION'S INFORMATION REQUEST

The General Counsel contends that SFW failed to honor Local 400's request for certain information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. And it is undisputed that SFW did refuse to provide information about a store called Total Beverage in Chantilly, Virginia, which store is within Local 400's jurisdiction; i.e., within 25 miles of Washington, D.C.

Sometime in July 1992 the Union heard a rumor to the effect that SFW was going to open a discount beer and wine store within Local 400's jurisdiction. That led Local 400's Mike Earman to ask Ed Kaplan, an SFW official, what connection SFW would have with the staffing of the new store. Kaplan confirmed the fact of the new store but initially said that matters pertaining to the store were none of the Union's business. Then, after some prodding by Earman, Kaplan said that SFW personnel were going to handle the hiring and training of the new store's employees and would thereafter administer the payroll of the store. When Earman claimed that the new store's employees would be members of the bargaining unit (see fn. 4, supra), Kaplan said that that was not the case.

When the Union again claimed—this time in a letter—that the employees of Total Beverage (at this point the not-yet-opened store had a name) would be members of the bargaining unit, SFW wrote back that: (1) the store would be an ''entirely separate operation from Shoppers'; and (2) ''it will not be a 'food store.''' Local 400 thereupon demanded to arbitrate the question of whether the collective-bargaining contract applied to Total Beverage's employees. SFW refused.

The significance of the term ''food store'' (to which SFW's letter referred) stems from the collective-bargaining agreement between Local 400 and SFW, which states that the agreement applies to SFW's ''food stores.''[9]

The Total Beverage store opened in October 1992. Within weeks members of Local 400 began supplying the Union with copies of invoices showing that at least some items being sold to Total Beverage were billed to Total Beverage ''c/o'' Shoppers Food Warehouse. A month or two later another union member provided documentation of an apparent ''transfer'' of some goods from SFW to the Total Beverage store. (The transferred goods: one case of strawberries; one case of mixed fruit.)

In the meantime Local 400 had begun litigation in a U.S. district court seeking an order that would compel SFW to arbitrate the dispute about whether the SFW-Local 400 collective-bargaining contract applied to Total Beverage's employees. In the course of that litigation the Union subpoenaed records of an affiliate of SFW, Dart Group Corporation. (I use the term ''affiliate'' because the individual who is the majority shareholder of SFW is also the majority shareholder of Dart Group.) On March 2, 1993, in a motion to quash, Dart Group stated that: (1) SFW, through a subsidiary, ''owned, managed, and operated'' Total Beverage ''prior to February 28, 1993''; (2) on February 27, 1993, SFW sold Total Beverage to a wholly owned subsidiary of Dart Group.

While all of this was going on, representatives of SFW and Local 400 were bargaining about a new collective-bargaining contract. (The previous contract provided for a February 4, 1993, expiration date. SFW and the Union had agreed to extend its terms until May 1993.) On March 11, 1993, SFW proposed that the new SFW-Local 400 contract not include a successorship provision. The previous contract did include such a provision.[10] That led the Local 400 representatives to consider the possibility that SFW was planning to move some of SFW's operations to other entities (thereby eliminating bargaining unit jobs). In the words of SFW's Earman:

> [T]he Union was extremely concerned that Shoppers was going to attempt to spin off certain parts of [its] operation and eliminate those operations in the supermarkets to escape the collective-bargaining agreement.

On March 12 (the day following SFW's proposal to eliminate the successorship provision), Local 400 sent the following letter to SFW:

> Please accept this letter as a formal request for documents and related information. The documents and information are necessary to the Union for the purposes of collective-bargaining and contract administration. As you know, Article 2.2 of the current contract addresses new Shoppers facilities. The Union is interested in that clause and its objectives in our current negotiations. The information requested below is necessary for the Union to formulate its contract proposals and establish its overall objectives. As you also know, the information is relevant to any determination of whether SFW has violated Article 2.2.

[9] See fn. 4, supra, and art. 2.2 of the agreement, quoted infra.

[10] The successorship clause in the old contract stated, in part:

> This Agreement shall be binding upon all signatories hereto, and their successors and assigns. . . . [T]he Employer promises that its operations covered by this Agreement or any part thereof shall not be sold, conveyed or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligation under this Agreement to offer employment to all of the Employer's current employees.

> 1. Who established the Total Beverage store in Chantilly, Virginia;
>
> 2. Who has owned, and in what shares, Total from its inception to date;
>
> 3. Who has managed and operated Total from its inception to date.
>
> Please also supply documents and other information concerning the purported recent sale of Total to Total Beverage G.B., Inc. [the reference is to the subsidiary of SFW that had owned Total Beverage and the subsidiary of Dart Group that, Dart Group claimed, now owned Total Beverage], including, but not limited to, any sales agreements, any documents referred to or appended to the sales agreement or any documents related to the sale.
>
> In short, the Union is interested in all pertinent information concerning who has owned, managed and operated Total from its conception to date.

Article 2.2 of the collective-bargaining contract, to which the Union's letter refers, states, in part that SFW—

> further agrees that if [SFW] should establish a new food store, or stores, within the territories described in Article II, paragraph 2.1 [see footnote 4, supra], this Agreement shall apply to such new store or stores.

As touched on earlier, SFW has refused to provide any of the requested information.[11]

Subsequently: (1) Local 400 filed an unfair labor practice charge alleging, inter alia, that Total Beverage was an alter ego of SFW, that SFW and Total Beverage were a single employer, that SFW had violated Section 8(a)(5) by not applying the collective-bargaining contract to Total Beverage's employees, and that SFW had failed to provide information properly sought by the Union;[12] (2) SFW withdrew its proposal to eliminate the successorship provision; (3) the Board's Regional Office advised Local 400 that no complaint would issue in response to the Union's unfair labor practice charge except in respect to the refusal-to-provide information allegation; and (4) the district court ordered SFW to arbitrate the dispute concerning the applicability of the collective-bargaining contract to the Total Beverage store.

The Information Request—Conclusion

SFW apparently operates what many of us would call ''supermarkets.'' Additionally the record informs us that SFW's stores are ''food stores,'' in the language of the Local 400-SFW collective-bargaining contract, and that SFW is engaged ''in the retail sale of groceries and other merchandise,'' in the words of the complaint. But the record tells us practically nothing about precisely what is sold at SFW's stores.

The record tells us even less about what Total Beverage sells. More importantly, the record is virtually silent about whether Total Beverage sells any of the kinds of products that SFW sells.[13] (All we know in this regard is that in the months that the Union was focusing on Total Beverage, the Union had reason to believe that on one occasion two boxes of fruit were transferred from a SFW store to Total Beverage.)[14] Did the Union bother to determine what the nature of Total Beverage's business is? All that would have taken, after all, would have been a stroll through the Total Beverage store. The record provides no indication that the Union did undertake this investigation. In this circumstance one might even make the assumption that the Union must have checked out the store and discovered that Total Beverage was not a ''food store'' and that it sold products that were different from SFW's.

I conclude that the record fails to show that the Union had any reasonable basis for believing that SFW and Total Beverage sold the same kinds of products.

That brings us to the Union's information request. The request concerns the ownership and management of the Total Beverage store. And there is no doubt that the Union had reason to believe that the ownership and management of SFW, on the one hand, and of Total Beverage, on the other, might be closely linked if not, indeed, identical.

But even assuming such identity of ownership and management, why would that affect the bargaining unit that the Union represents? Since, on this record, the Union had no reason to think that SFW and Total Beverage sold the same kinds of products, the Union could not reasonably believe that the operation of Total Beverage would affect the members of the SFW bargaining unit. (Of course, if the Union believed that the nature of Total Beverage's operation was about to change, different considerations would arise. But there is no evidence that the Union had reason to be concerned about that either.)

There are the two facts that: (1) in October 1992 SFW established and began operating the Total Beverage store; and (2) in March 1993 SFW proposed that the successorship clause be eliminated from its collective-bargaining contract with Local 400. But, again, consider that the Union had no reason to think that the business of the SFW stores and the Total Beverage store overlapped. That being the case, it was wholly speculative for the Union to concern itself about the possibility that SFW's successorship proposal meant that SFW was planning to sell or transfer some part of its operation and that, if there was such a plan, the purchaser or transferee would be Total Beverage.

''It is well settled that an employer has a statutory obligation to provide, on request, relevant information the union needs for the proper performance of its duties as collective-bargaining representative.'' *Knappton Maritime Corp*., 292 NLRB 236, 238 (1988). The standard for determining the rel-

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[11] Answers to some of the queries had already been set out in Dart Group's motion to quash (as discussed above). But SFW and Dart Group are, of course, different entities.

[12] The allegation regarding failure to provide information was contained in a May 12, 1993, amendment to the Union's unfair labor practice charge.

[13] In the letter by which Region 5 advised Local 400 of the Region's decision to issue a complaint only in respect to SFW's refusal to provide information, the Region stated:

> Shoppers Food Warehouse is a retail chain engaged primarily in the sale of groceries. Total Beverage is a retail outlet that sells some food products, but most of its revenues are derived from the sale of beverages.

I do not, however, consider that to be evidence of the nature of SFW's or Total Beverage's business.

[14] I do not read the evidence showing that certain items were delivered to Total Beverage but were billed to SFW as indicating that such items were sold by SFW as well as by Total Beverage.

evancy of the requested information, moreover, is ''a liberal discovery-type standard.'' Id. at 238–239, quoting *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967).

Still, relevance must be shown. And where a union has requested information with respect to matters outside the bargaining unit (as is the case here), the burden is on the union to demonstrate that the information is relevant. *Knappton Maritime*, supra at 238. Here there has been no such demonstration. I accordingly shall recommend that the complaint be dismissed insofar as it alleges that SFW unlawfully failed to provide the information sought by Local 400.

REMEDY

Employee Frederick Plummer asked Local 400 to file a grievance on his behalf against SFW. The Union did so. Thereafter SFW and Plummer, at SFW's unlawful instigation, privately negotiated a settlement of the grievance. Subsequently SFW did negotiate with the Union concerning settlement of the grievance. But SFW and the Union have been unable to resolve the backpay facet of the grievance and the Union has chosen not to demand arbitration. Plummer is no longer employed by SFW.

Under these circumstances it seems to me that all there is to do is to order SFW to cease and desist meeting with employees regarding grievances without affording the Union an opportunity to be present.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Shoppers Food Warehouse Corporation, Lanham, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Meeting with employees regarding their grievances without affording an opportunity to be present to the labor organization that is the exclusive bargaining representative of the unit of which the employees are members.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at all of its stores in Clinton, Maryland, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''